



RECEIVED

Eric S. Heath  
Attorney

2001 SEP 18 A 11:44

AZ CORP COMMISSION  
DOCUMENT CONTROL



0000020748

100 Spear Street, Suite 930  
San Francisco, CA 94105  
Telephone: 415-371-7179  
Facsimile: 415-371-7186  
Email: [eric.s.heath@mail.sprint.com](mailto:eric.s.heath@mail.sprint.com)

September 17, 2001

Docket Control  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, AZ 85007-2996

Arizona Corporation Commission

DOCKETED

SEP 18 2001

DOCKETED BY	<i>nee</i>
-------------	------------

**RE: Docket No. T-00000B-97-0238**

Dear Docket Clerk:

Enclosed you will find the original and 10 copies of Sprint Communications Company L.P.'s Brief Regarding Public Interest in the above-referenced docket number.

Thank you for your assistance in this matter. Feel free to contact me with any questions or concerns you may have.

Sincerely,

Eric S. Heath

ESH:km

Enclosures

ORIGINAL

**BEFORE THE ARIZONA CORPORATION COMMISSION**

**WILLIAM A. MUNDELL**  
**Chairman**

**JAMES M. IRVIN**  
**Commissioner**

**MARC SPITZER**  
**Commissioner**

**In the Matter of the Investigation Into U S ) Docket No. T-00000B-97-0238**  
**WEST Communications, Inc.'s Compliance )**  
**With Section 271 of the )**  
**Telecommunications Act of 1996. )**  
\_\_\_\_\_ )

**SPRINT COMMUNICATIONS COMPANY L.P.'S**  
**BRIEF REGARDING PUBLIC INTEREST**

**INTRODUCTION**

Qwest's application for in-region, interLATA authority is premature and not in Arizona's public interest for at least four reasons. First, the evidence shows that Qwest faces no substantial, irreversible competition from CLECs for local services in this state. Second, Qwest's past anticompetitive behavior shows that its entry into the interLATA market likely would reduce competition, erode service quality, and artificially inflate prices for both local and long-distance services. Third, Qwest's mere promise of a Performance Assurance Plan is not sufficient to address its market power and anticompetitive behavior. Fourth, as a prerequisite for

271 approval and effective competition in Arizona, the Commission must establish permanent TELRIC-based pricing for UNEs, collocation, and other wholesale services for Qwest.

**I. Qwest Faces No Substantial, Irreversible Competition In Arizona.**

Qwest cannot satisfy its burden to show that its interLATA authorization would be “consistent with the public interest, convenience, and necessity.” 47 U.S.C. § 271(d)(3)(C). According to the FCC, compliance with the 14-point checklist alone is not sufficient to satisfy this public interest requirement:

In making our public interest assessment, we cannot conclude that compliance with the checklist alone is sufficient to open a BOC’s local telecommunications markets to competition. If we were to adopt such a conclusion, BOC entry into the in-region interLATA services market would always be consistent with the public interest requirement whenever a BOC has implemented the competitive checklist. Such an approach would effectively read the public interest requirement out of the statute, contrary to the plain language of section 271, basic principles of statutory construction, and sound public policy.<sup>1</sup>

Thus, as the FCC repeatedly has confirmed, “the public interest requirement is independent of the statutory checklist and, under normal canons of statutory construction, requires an independent determination.”<sup>2</sup> It requires the Commission “to review the circumstances presented

---

<sup>1</sup> *In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region InterLATA Services in Michigan*, 12 FCC Rcd 20,543, ¶ 389 (1997) (“Michigan 271 Order”).

<sup>2</sup> *In the Matter of the Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region InterLATA Services in Kansas and Oklahoma*, 2001 FCC LEXIS 1202, ¶ 267 (2001) (“Kansas-Oklahoma 271 Order”); see also *In the Matter of the Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance, Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region InterLATA Services in Texas*, 15 FCC Rcd 18,354 ¶ 417 (2000); *In the Matter of the Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the State of New York*, 15 FCC Rcd 3953, ¶ 423 (1999) (“New York 271 Order”).

by the applications to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open.”<sup>3</sup> In short, the essence of the public interest inquiry is for the Commission to determine whether, notwithstanding checklist compliance, the BOC applicant’s local markets are irreversibly open to competition.

That plainly is not the case with Qwest's local Arizona markets. Competition in the residential sector is very limited (Ex. 7-ATT-2, Rasher Aff. ¶¶ 53-59, at 21-24). Qwest Witness Mr. Teitzel’s data is old and fails to account for all of the CLEC and DLEC failures in the last year. (See Ex. 7-ATT-2, Rasher Aff. ¶ 60, at 24; Ex. 7-WCOM-1, Price Direct at 19.) Contrary to Mr. Teitzel’s suggestion, recent failures of CLECs and DLECs are not primarily attributable to the general market downturn and reduction in venture capital. (See Ex. 7-Qwest-17, Teitzel Rebuttal at 19.) If that were the case, BOCs like Qwest and SBC would have similar trouble attracting capital. But the RBOC’s performance in the financial markets has far surpassed that of the CLECs, DLECs, and IXC. (Ex. 7-WCOM-1, Price Direct at 19-20.) The most logical explanation of this contrast in market performance is that investors now perceive (correctly) that the BOCs' monopoly over the essential facilities that provide access to retail customers has given them a rock-solid competitive advantage over their wholesale customers (and erstwhile retail competitors) despite the protections of the 1996 Act. The rash of CLEC and DLEC bankruptcies, the reduced financial strength of the IXCs, and the inability (or refusal) of the BOCs to compete in each other's local markets also bode ill for the future of local competition in Arizona. (*Id.* at 18-23.)

---

<sup>3</sup> *Kansas-Oklahoma 271 Order* ¶ 267; see also *New York 271 Order* ¶ 423.

## **II. Qwest's Anticompetitive Behavior Likely Would Harm The Local And Long-Distance Markets In The Future.**

Even if there were some prospects for future competition in the local Arizona markets, the Commission can have no confidence that Qwest would work to preserve that competition. Whether a BOC has cooperated in opening its local market to competition is another factor the FCC takes into account in determining whether the local market is or will remain open to competition:

Furthermore, we would be interested in evidence that a BOC applicant has engaged in discriminatory or other anticompetitive conduct, or failed to comply with state and federal telecommunications regulations. Because the success of the market opening provisions of the 1996 Act depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECs with their statutory obligations, evidence that a BOC has engaged in a pattern of discriminatory conduct or disobeying federal and state telecommunications regulations would tend to undermine our confidence that the BOC's local market is, or will remain, open to competition once the BOC has received interLATA authority.<sup>4</sup>

In this case, the wealth of evidence that Qwest has both (1) disobeyed federal and state telecommunications regulations and (2) engaged in anticompetitive conduct should undermine this Commission's confidence that Qwest's local markets would or could remain open to competition.<sup>5</sup>

---

<sup>4</sup> Michigan 271 Order ¶ 397 (*citation omitted*).

<sup>5</sup> Ms. Rasher and Mr. Price both testified to Qwest's pattern of violating Section 271 and applicable state law and engaging in anticompetitive conduct throughout its region. (See Ex. 7-ATT-2, Rasher Aff. at 13-21; Ex. 7-WCOM-1, Price Direct at 37-45.) Mr. Teitzel's response that such anticompetitive conduct is beyond the scope of this proceeding is at odds with the FCC's teaching that it helps answer the question whether a BOC's markets are or will remain open. (See Ex. 7-Qwest-17, Teitzel Rebuttal at 12; *id.* at 18-19.) As Mr. Price testified,

Qwest's historic pattern of treating its wholesale customers as second class citizens can hardly be reconciled with the notion that Qwest's local telecommunications market in Arizona is irreversibly open to competition. The image that appears in the crystal ball is of a Qwest continuing to exercise a tight

That same evidence should undermine the Commission's confidence that Qwest would refrain from anticompetitive behavior in the interLATA market, where its control of access to retail customers and ability to easily bundle services would provide it with an excellent opportunity to squeeze out its long-distance competitors. Don Price, who testified for WorldCom, offered a good example of how Qwest might do that. According to Mr. Price, Qwest has provided WorldCom and other IXC's with woefully insufficient direct access to customers. (Ex. 7-WCOM-1, Price Direct at 50-59.) If Qwest were permitted to enter the interLATA market, it would have even less incentive to provide IXC's with adequate access service, since Qwest would be competing with IXC's to sell long distance to the same customers. (*Id.* at 59.)

### **III. Qwest's Mere Promise of A Performance Assurance Plan Is Not Sufficient.**

In an effort to show that it will continue to meet its § 271 obligations after entering the long distance market, Qwest has promised to enter into a Performance Assurance Plan (PAP). Because there has been no Commission ruling regarding Qwest's proposal for a PAP, it is premature to determine whether Qwest's application is in Arizona's public interest. Until the promised plan has been reviewed, considered, and finalized, there can be no assurance that the plan will be sufficient to ensure that Qwest meets its obligations if and when it enters the long-distance market.

---

grip on the Arizona local telecommunications market. Furthermore, it is an image of a Qwest that will utilize its market power in local telecommunications to disadvantage competitors in both the emerging broadband market and in the already competitive long distance market. (Ex. 7-WCOM-1, Price at 46.)

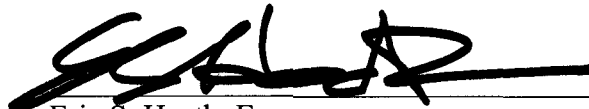
**IV. Permanent UNE and Other Wholesale Prices Must Be Established Before the ACC Can Deem Qwest's § 271 Application in Compliance with the Public Interest.**

Qwest's compliance with the public interest requirements under the Act must be deemed premature until final UNE and wholesale pricing is established. Although this Commission has an open docket to investigate Qwest's wholesale costs, this inquiry is by no means complete. In fact, although Phase II, which involves the recently completed hearings on UNEs, loops, line conditioning, and collocation costs, is coming to a close with reply briefs due this Friday, the Commission must still hold hearings on switching cost, which is scheduled for another phase of this proceeding. Absent permanent pricing for these essential services for retail competition in Arizona, just and reasonable rates will elude competitive service providers, which will only serve to further impede competition in Arizona as CLECs and DLECs are faced with significant barriers to entry.

**CONCLUSION**

For the reasons discussed above, Qwest has not demonstrated that it meets the public interest requirements of § 271.

Dated this 17<sup>th</sup> day of September 2001 at San Francisco, California.




Eric S. Heath, Esq.  
Sprint Communications Company L.P.  
100 Spear Street, Suite 930  
San Francisco, CA 94105  
Telephone: 415-371-7179  
Facsimile: 415-371-7186  
email: eric.s.heath@mail.sprint.com

## CERTIFICATE OF SERVICE

I, KATHERINE M. MCMAHON, hereby certify that I have this day served a true and correct copy of Sprint Communications Company L.P.'s Brief Regarding Public Interest in Docket No. T-00000A-97-0238 upon all parties of record reflected on the attached list.

Dated this 17<sup>th</sup> day of September 2001 at San Francisco, California.

A handwritten signature in cursive script, reading "Katherine M. McMahon", is written over a horizontal line.

Katherine M. McMahon  
Legal Analyst II



Arizona

Docket No. T-00000A-97-0238

Date: Sept. 17, 2001

Service List

Charles Steese  
Andrew Crain  
Qwest  
1801 California Street, #5100  
Denver, CO 80202

Maureen Arnold  
Qwest  
3033 N. Third Street, Room 1010  
Phoenix, AZ 85012

Thomas H. Campbell  
Lewis & Roca  
40 N. Central Avenue  
Phoenix, AZ 85007

Karen F. Clauson  
WorldCom  
707 17<sup>th</sup> Street, #3900  
Denver, CO 80202

Richard S. Wolters  
AT&T  
1875 Lawrence Street, Room 1575  
Denver, CO 80202

Scott S. Wakefield  
RUCO  
2828 N. Central Avenue, Suite 1200  
Phoenix, AZ 85004

Douglas Hsiao  
Jim Scheltema  
Blumenfeld & Cohen  
1625 Massachusetts, NW, Suite 300  
Washington, DC 20036

Mark N. Rogers  
Excell Agent Services, L.L.C.  
2175 W. 14<sup>th</sup> Street  
Tempe, AZ 85281

Jon Loehman  
SBC Telecom, Inc.  
5800 NW Parkway, Suite 135  
San Antonio, TX 78249

Michael M. Grant  
Todd C. Wiley  
Gallagher and Kennedy  
2575 E. Camelback Road  
Phoenix, AZ 85016-9225

Nigel Bates  
Electric Lightwave, Inc.  
4400 NE 77<sup>th</sup> Avenue  
Vancouver, WA 98662

Andrew O. Isar  
Telecommunications Resellers Assn.  
4312 92<sup>nd</sup> Avenue, NW  
Gig Harbor, WA 98335

Mark Dioguardi  
Tiffany and Bosco, PA  
1850 N. Central Avenue  
Phoenix, AZ 85004

Joyce Hundley  
U.S. Department of Justice  
1401 H Street, NW, Suite 8000  
Washington, DC 20530

Lyndon J. Godfrey  
AT&T  
111 West Monroe, Suite 1201  
Phoenix, AZ 85003

Michael W. Patten  
Roshka Heyman & DeWulf  
400 E. Van Buren, Suite 800  
Phoenix, AZ 85004

Robert S. Tanner  
Davis Wright Tremaine  
17203 N. 42<sup>nd</sup> Street  
Phoenix, AZ 85032

Lyndall Nipps  
Allegiance Telecom, Inc.  
845 Camino Sure  
Palm Springs, CA 92262

Timothy Berg  
Fennemore Craig  
3003 N. Central Avenue, Suite 2600  
Phoenix, AZ 85016

Thomas L. Mumaw  
Jeffrey W. Crockett  
Snell & Wilmer  
One Arizona Center  
Phoenix, AZ 85004-0001

Bradley Carroll  
Cox Arizona Telcom, L.L.C.  
1550 W. Deer Valley Road  
Phoenix, AZ 85027

Charles Kallenbach  
American Comm. Services, Inc.  
131 National Business Parkway  
Annapolis Junction, MD 20701

Joan Burke  
Osborn Maledon  
2929 N. Central Avenue, 21<sup>st</sup> Floor  
Phoenix, AZ 85067-6379

Daniel Waggoner  
Davis Wright Tremaine  
1501 Fourth Avenue  
Seattle, WA 98101-1688

Diane Bacon  
Communications Workers of America  
5818 N. 7<sup>th</sup> Street, Suite 206  
Phoenix, AZ 85014-5811

Mark P. Trincherro  
Traci Grundon  
Davis Wright Tremaine  
1300 SW Fifth Avenue, Suite 2300  
Portland, OR 97201

M. Andrew Andrade  
5261 S. Quebec Street, Suite 150  
Greenwood Village, CO 80111

Raymond S. Heyman  
Randall H. Warner  
Roshka Heyman & DeWulf  
400 E. Van Buren, Suite 800  
Phoenix, AZ 85004

Brian Thomas  
Time Warner Telecom, Inc.  
520 SW 6<sup>th</sup> Avenue, Suite 300  
Portland, OR 97204

Barbara P. Shever  
Z-Tel Communications, Inc.  
601 S. Harbour Island Blvd., Ste. 220  
Tampa, FL 33602

Garry Appel  
TESS Communications, Inc.  
1917 Market Street  
Denver, CO 80202

Docket Control  
Arizona Corporation Commission  
1200 W. Washington Street  
Phoenix, AZ 85007

Maureen Scott  
Arizona Corporation Commission  
1200 W. Washington Street  
Phoenix, AZ 85007

K. Megan Doberneck  
Covad Communications Company  
4250 Burton Street  
Santa Clara, CA 95054

Gena Doyscher  
Global Crossing Local Svcs., Inc.  
1221 Nicollet Mall  
Minneapolis, MN 55403-2420

Jonathan E. Canis  
Michael B. Hazzard  
Kelley Drye & Warren, L.L.P.  
1200 19<sup>th</sup> Street, NW, 5<sup>th</sup> Floor  
Washington, DC 20036

Christopher Kempley  
Arizona Corporation Commission  
1200 W. Washington Street  
Phoenix, AZ 85007

Lyn Farmer  
Arizona Corporation Commission  
1200 W. Washington Street  
Phoenix, AZ 85007

Al Sterman  
Arizona Consumers Council  
2849 E. 8<sup>th</sup> Street  
Tucson, AZ 85716

Dennis D. Ahler  
Eschelon Telecom, Inc.  
730 Second Avenue, S, Suite 1200  
Minneapolis, MN 55402

Andrea P. Harris  
Allegiance Telecom, Inc.  
2101 Webster, Suite 1580  
Oakland, CA 94612

Steve Olea  
Arizona Corporation Commission  
1200 W. Washington Street  
Phoenix, AZ 85007